IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

First Appeal No. 2603 of 2005

SHIVAJI BABURAO MAGAR AND ORS. ... appellants
V/S
KUSUM KHANDU SABALE AND ORS. ... respondents

Mr. Girish S. Godbole for appellant.
None for respondents.

CORAM: R.M.S. KHANDEPARKAR
&
MRS. ROSHAN DALVI JJ.
DATE:27/03/2006

P.C.:

1. Heard learned advocate for the appellant. The appellant has produced copy of the entire record before the trial court. On perusal of the entire record it is apparent that the trial court after considering the fact that the appellant had failed to establish that the appellants were always ready and willing to perform their part of the obligation particularly in relation to the payment of balance amount in terms of the agreement for

sale, the specific performance of the agreement for sale has been refused and the respondents have been directed to repay the earnest money of Rs.2 lakhs which were received by them from the appellant, along with interest at the rate of 12% per annum thereon.

2. Drawing attention to the decision of the Apex Court in the case of **Boramma vs. Krishna Gowda and ors.** reported in **(2000) 9 SCC 214** the learned advocate for the appellant has submitted that readiness and willingness is not required to be proved by actual payment of balance amount under the agreement, but suffice to establish readiness and willingness by other evidence on record. However, the same having been totally ignored by the trial court, the impugned order is liable to be set aside.

3. Perusal of the impugned order discloses that the parties had entered into the agreement whereby the respondent had agreed to sell to the appellant the suit land for a valuable consideration of Rs.14,50,000/-. By the time the agreement was executed the amount of Rs.2 lakhs was paid as earnest money. It was agreed in the agreement that on conclusion of

the dispute regarding the record of rights in relation to the property in question the sale to be completed on payment of the balance amount. Since the appellant did not pay the balance amount for a considerable period of time, a notice was issued to him by the respondent on 2nd May 2001. The same was replied by the appellant contending that the necessary survey dispute had not been concluded and further that the land had not been measured and on completion of the same appellant would be ready and willing to execute the deed and to make the payment of balance amount. Since thereafter nothing was heard by the appellant, the appellant filed the suit for specific performance.

4. The trial court after considering the fact that the survey dispute had already been finally concluded prior to the execution of the agreement and thereafter there was no further appeal or revision against the decision of the revenue authorities, held that there was no justification for the appellant to prolong the execution of the sale deed. As regards the measurement of the property is concerned the trial court has held that there was no dispute in respect of the

area or boundaries of the suit land and therefore it was not necessary to measure the suit land before the execution of the sale deed. There was no readiness or willingness on the part of the appellant as it appeared that the appellant was not having sufficient funds to pay the balance amount.

5. The said findings arrived at by the trial court are clearly borne out from the record, inasmuch as that after service of the notice dated 2nd May 2001 the appellant replied the said notice contending that no measurements had been taken and that the respondents had not been informed about the final decision of the survey dispute. Undoubtedly the petitioner did not tender the balance amount to the respondents. Further more the evidence on record clearly discloses that the grievance of the appellant that the survey dispute was not over till May 2005 was totally contrary to the records. Though for a considerable time the entry in the record of rights might have remained unchanged inspite of the order passed by the revenue authorities, but it was possibly a matter of execution of the order of revenue authorities. In any case, undisputedly, the order passed by the revenue

authorities on 6th May 1997 had attained finality for all purposes and there was no scope for any grievance regarding the rights of the respondent in relation to the suit property and the same was to the knowledge of the appellant. As regards the measurement, as already held by the trial court there was no dispute either relating to the area of the property or the limits of the boundaries of the property. That being so once it was admitted that the agreement for sale was executed in October 1997 and till May 2001 the appellant had not paid the balance amount inspite of specific demand in that regard by the respondent, it was apparent that the appellant was not ready and willing to perform their part of the agreement of sale and the finding arrived at in that regard cannot be found fault with.

6. The decision of the Apex Court in **Boramma's case** (supra) is that explanation to clause (c) of section 16 makes it clear that where a contract involves the payment of money, it is not essential for the 1st defendant to deposit in court any money except when so directed by the court, applies to the stage on or after the filing of the suit and not prior to the filing of the

suit. The appellants have not paid the balance amount till this date.

7. The material on record clearly discloses failure on the part of the appellant to establish the ingredients of section 16(c) of the Specific Relief Act. There is absolutely no case for interference in the impugned judgment under Order 41 Rule 11 of CPC. Hence the appeal is liable to be dismissed and is hereby dismissed.

(MRS. ROSHAN DALVI J.) (R.M.S.KHANDEPARKAR J)